Supreme Court of the United States

OCTOBER TERM, 1952

No. 341

WILLIAM POULOS, APPELLANT,

vs.

THE STATE OF NEW HAMPSHIRE

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF NEW HAMPSHIRE

Petition for Rehearing

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MAY IT PLEASE THE COURT:

Now comes Hayden C. Covington, counsel for appellant, and petitions the Court for a rehearing pursuant to Rule 33. Mr. Justice Reed extended the time to and including May 21, 1953, to file this petition. It is filed in time. The reasons of counsel for appellant shall now be stated. He says:

I.

This is no formal protest to the Court. Mistakes and

oversights appear in the opinion. The omissions and mistakes ought to be called to the attention of the Court because, through them, grievous wrong has been done to equal justice under law. That's why this petition is filed. I believe the Court will thank me for calling them to its attention. Now, please bear with me. Let me try to prove that seeds not intended to be sown by the Court have taken root and soon the Court will reap tares instead of wheat! It is not necessary for me to show the Court why the dissents of Mr. Justice Black and Mr. Justice Douglas are correct and should be unanimously used by the Court to uproot the strange and foreign sapling planted by the majority here. Those eloquent opinions stand by their own strength. They cannot be steam-rollered out of the way of the majority.

II.

(1) About part First of the opinion of the Court, Mr. Justice Frankfurter is right. See his concurring opinion. I didn't contend that the ordinance was construed and applied by the state courts. My argument was: the *city council* unconstitutionally enforced, construed and applied the ordinance; not the courts! I admitted that the ordinance is valid on its face. My contention that the ordinance was invalid as construed and applied was never decided by the state courts. The state courts and this Court were requested to declare the unconstitutionality of the enforcement of the ordinance by the city council. The state courts refused to say whether the city council defied the First and Fourteenth Amendments as contended. Neither did this Court say so. It stayed away from the point as far as possible, as though it were dynamite. It passed on whether the ordinance was void on its face (not raised) and as construed and applied by the state courts, when they didn't even determine that question.

(2) Perhaps this Court was misled by the holding of

the Supreme Court of New Hampshire on the certified questions. (*State* v. *Derrickson*, 97 N. H. 91, 81 A. 2d 312) The only time that the courts passed on the validity of the ordinance was when the Supreme Court of New Hampshire erroneously held that the city had properly zoned and allocated parks for religious meetings. This was a finding not justified by the stipulated facts. It was disproved at the second trial, in the Superior Court. See the record in this case. [4, 5, 6, 39, 44, 46-47, 49, 50, 52, 56][1] Whether the First and Fourteenth Amendments were violated by the executive state action of the city council was never determined (after the answer to the certified questions) by the state courts on the conviction or the appeal therefrom.

(3) The question presented by the appeal from the conviction to the Supreme Court of New Hampshire and to this Court was: Did the enforcement of the ordinance by the City Council of Portsmouth and the construction of it by the state courts denying the appellant the right to challenge its constitutionality because he failed to resort to the judicial remedy of certiorari, both or together violate the rights of the appellant contrary to the First and Fourteenth Amendments? In other words: Did the joint action, or the separate action, of the city council and the courts contravene the First and Fourteenth Amendments?

(4) The court below passed on only one phase of the question. It held that the federal question of invalidity of the enforcement of the ordinance by the city council couldn't be raised in defense to the prosecution. It said that the defense could be preserved only by way of certiorari. This was the only part of the question ruled on by the courts below.

(5) Neither the state courts nor this Court passed on the phase of the question that tested the constitutionality of the ordinance as enforced by the city council. Yet the

[1] Figures appearing in brackets herein refer to pages of the printed transcript of record.

ordinance is admitted to have been wrongfully and arbitrarily construed and applied. Did that admission by this Court amount to a holding that the construction of the ordinance by the city council violated the federal Constitution? I suggest that the Court's holding is ambiguous. It does; then it does not! Which is it? It is an evasion of the federal question on slender grounds. This evasion may be all right for the state courts. Arbitrariness, capriciousness and wrongfulness may be state questions. But it is highly out of place for this Court to side-step the unconstitutionality of the enforcement of the ordinance by the city council through merely holding that the denial of the permit was *wrongful*. It should not decide a question not presented in the record, as demonstrated by the opinion of Mr. Justice Frankfurter. The Court did this, however, in point First of its opinion.

(6) The error of this Court in discussing the wrong question and in failing to discuss the one raised ought now to be corrected. To that end and so that equal justice under law may be preserved, a rehearing and reargument of this appeal ought to be ordered. It cannot be said that the rehearing should not be granted because the unconstitutional action of the city council is not before the Court. It is.—See *Enterprise Irrigation Dist.* v. *Farmers' Mutual Canal Co.*, 245 U. S. 157, 164, 166; *Ward* v. *Board of County Commissioners*, 253 U. S. 17, 22; *Postal Tel. Cable Co.* v. *Newport*, 247 U. S. 464, 475-476; *Lawrence* v. *State Tax Comm'n*, 286 U. S. 276, 282; *Rogers* v. *Alabama*, 192 U. S. 226, 230-231; *Davis* v. *Wechsler*, 263 U. S. 22, 24; *Brown* v. *Western Railway*, 338 U. S. 294, 299; *Chicago B. & Q. Ry.* v. *Drainage Comm'rs*, 200 U. S. 561, 580; *West Chicago St. R. Co.* v. *City of Chicago*, 201 U. S. 506, 519-520 and *Wood* v. *Chesborough*, 228 U. S. 672, 676-680.

(7) If this petition isn't allowed, then the unnatural deformity (not supported by the record) will stand for all time. All of us, including the courts below, know that that

deformity should never have been artificially impregnated into this case. It has swollen now to envelop and hide the real question raised: unconstitutionality of the action by the city council. It should be uprooted and pulled out of the record. This can be done only by a reargument and a resubmission of this case. For this reason alone the petition should be granted by the Court.

(8) I agree, therefore, with Mr. Justice Frankfurter on the error of the Court in its discussion of the question in part First of the opinion and I adopt his statements here. On the other hand, I disagree with his statement that the case should be treated as though it were here on certiorari. There is involved here the constitutionality of the ordinance, as applied by the courts in denying a federal defense and as enforced by the city council in unconstitutionally denying the application for a permit to use the park. This joint state action under the ordinance on the part of the city council and the courts together gives jurisdiction to this Court by appeal.—*Jamison* v. *Texas*, 318 U. S. 413.

III.

(1) Under part Second of the opinion of the Court, several times the Court limits appellant's contention. I didn't limit it to that considered by the Court: wrongful, arbitrary and capricious refusal by the city council to grant the permit. The statement of the Court about my contention is all right as far as it goes. But the Court doesn't go far enough. Only part of the truth is told. The whole contention made by me included the fact that appellant said the ordinance, as construed and applied by the city council, was a violation of his rights under the First and Fourteenth Amendments.

(2) There is a vast difference between (a) *wrongful* refusal, and (b) *unconstitutional* refusal of a permit. A refusal to grant a license may be wrongful and yet not unconstitutional. Why didn't the Court state this federal

contention in its opinion? A footnote of the opinion shows the actual contention made, which includes the federal question actually raised. The discussion by the Court of the question raised would, however, lead the reader to believe that the contention actually made was only that the refusal of the permit was arbitrary, capricious and wrongful. The truth of the matter is: The contention made all along the way very strongly is that the denial of the permit was a construction and application of the ordinance by the city council that flouted the First and Fourteenth Amendments to the United States Constitution. This was one phase of the federal question completely overlooked by the Court! Why?

(3) Had the opinion stated correctly the federal invalidity of refusal of the permit, the Court would have shown the full and complete and real federal question to be decided. That question was: Do (a) the unconstitutional refusal of the permit by the city council, and (b) also the denial of the defense to the prosecution, both or separately, constitute state action in violation of the First and Fourteenth Amendments? This dual question was properly presented in the courts below. It, with its two heads, is properly before the Court. The basis of the federal question has been missed by the Court through its saying that my contention was that the refusal of the license was wrongful. Instead the Court should say that the denial of the permit was claimed to be an unconstitutional enforcement and an executive construction of the ordinance by the city council in violation of the First and Fourteenth Amendments.

(4) The Court concedes that, if a permit had been denied under a void-on-its-face provision of an ordinance, the defense of a violation of the federal Constitution could be raised in this prosecution. This Court has said many times that a statute or an ordinance may be perfectly valid as passed by the legislature, but it becomes unconstitutional when enforced by the executive or administrative branch of the government. This law has been declared in so many

cases that it is trite to repeat it here. Yet it is necessary to say it again here because this Court has discriminated. It has invented a new distinction sustaining the invocation of the federal Constitution against legislative action but denying the right to raise it against administrative action.

(5) Does the Court now hold that, if a valid law is illegally administered so as to deprive a citizen of a federal right, the state courts can bar the citizen from asserting that the federal Constitution has been violated by the executive enforcement of the law? Well, the Court has held just that! Now, how can the Court, without blinking an eye, pitch out tons of printed pages of its opinions where the Court has said that it and the other federal courts may not be prevented from passing on a violation of the Constitution purely because it is done by the administrative branch of the state governments and not by the legislative branch? Has not this Court ruled inconsistently with its former holdings on this point? Yes! The Court did! See paragraphs (5) and (6) of V, at pages 11-12, below.

(6) Now, what's wrong? It seems plain to me that the Court has lost itself in a fog of abstractions and wandered into a labyrinth of argument about supremacy of municipal and judicial convenience over the First Amendment. The Court has for the first time held that judicial and municipal convenience constitute grounds for throwing away the First Amendment. To the contrary of the ruling here, this Court has many times held that rules of convenience do not weigh enough to overbalance the very heavy First Amendment. —*Schneider* v. *New Jersey*, 308 U. S. 147, at pages 161-162; *Thornhill* v. *Alabama*, 310 U. S. 88, at pages 95-98; *Cantwell* v. *Connecticut*, 310 U. S. 296, at pages 305-306; *Lovell* v. *Griffin*, 303 U. S. 444, at pages 452-453; *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, at pages 638-639.

(7) Now the Court dashes along and, in one cavalier spurt, speeds through the red light of these decisions. Hasn't

the Court reversed itself? The decision here comes from blindness to its own holdings! Isn't it deafness to the commands of the 'founding fathers' who spoke to us in the First Amendment? This action conflicts with the Court's holdings last above cited. Alone, it's sufficient grounds for rehearing.

(8) The brief and pungent opinions of Mr. Justice Black and Mr. Justice Douglas clearly demonstrate the irreparable injury to the Constitution and the people by the decision in this case. To add any comment about them is gilding the lily. I won't do that! Let me adopt their opinions and make them a part of this petition for rehearing. Please consider them as a part of this petition. The statement that "delay is unfortunate" has not frozen the ice thick enough to support skating over any of the points made by Mr. Justice Black and Mr. Justice Douglas in their dissents (or by me in the main brief and reply brief). I ask the Court to reconsider the main brief and the reply brief in this case if more argument is required. Please do this, if there is an inclination to overrule this petition.

(9) Up until April 28, 1953, the people of the United States have been told by this Court that if they have a federally secured right and have complied with the administrative procedure validly required by the state, then they can exercise that federal right. Then comes the opinion for the Court! Where's the right now? Bogged down in the muddy ditch of convenience to courts. How can it be enjoyed, be free and be exercised if it's hamstrung by the "unfortunate delay" of prior judicial review? Isn't prior judicial review equally as vicious and unconstitional as prior restraint by the legislature? It's a burden and an abridgment upon the rights guaranteed by the First Amendment. We have prior restraint here under a valid law! Don't we? It's by the city council, and we're face to face with it! But the Court jumped the high fence of the arena to escape it and ran away from the unconstitutional enforcement of the law by the city council. Now it hides behind the

new, alien and diaphanous doctrine of prior judicial review and "unfortunate delay" grafted on to the First Amendment. What next!

IV.

(1). The "unfortunate delay" theory of the Court reminds me of the alligator allegory by Sir Winston. It is directly in point. He said: "Each one hopes that if he feeds the crocodile enough it will eat him last." The Court has fed religious park meetings and public religious talks in parks to the 'alligator' of expediency, order and convenience. All the talking in the world about order, convenience, necessity and "unfortunate delay"—words, words and more words —can't hide that fact either!

(2) May I state a hypothetical case to prove the application here of the statement by Sir Winston? It alone will be enough to show the need of a rehearing. Suppose there were a valid law regulating the church meeting places in Portsmouth. It isn't necessary to assume that Jehovah's witnesses have a church there; they do. See the record. [35] Assume then that the city council under the valid regulatory law unconstitutionally denied Jehovah's witnesses the right to open the door of their church and hold their religious meetings or permit their ministers to preach in such church? Then what?

(3). The very logic and force of the opinion of the Court, when applied in the light of this new situation, is that the city council could keep the church of Jehovah's witnesses closed for years. They would be prevented from assembling for worship upon their own private property until the long, drawn-out court proceedings were finished in this Court. "Unfortunate delay," you say! *Foul play,* I say! It makes Stalin chuckle in his grave. It causes the 'founding fathers', however, to thunder up from their graves a protest against the innovation and abberation of the Court in this case.

(4) The next step would be to treat some other mor popular religious group in the same way. And so on and o as the radical element grows in power in the administratio of government—state, local or national. Then you have th 'alligator' of expediency snapping at your own orthodox an accepted religions. Soon they would be decimated by th creeping monster of "unfortunate delay", order and loca fashion of convenience. That will be the end of religion an the First Amendment! Through the decision in this case th Court will have hog-tied itself! It will be too late to save the popular religions from being 'bait for the crocodiles'. You say it can't happen here? It has happened here! Read and reconsider the opinion of the Court. Then hitch it on to the above logical train of developments. There you have it, gentlemen!

V.

(1) The Court distinguishes *Royall* v. *Virginia*, 116 U. S. 572. It relies on the dictum in that opinion, which begins with the words, "as a general rule," and which continues by saying that mandamus is sufficient to protect against the "wrongful" denial of the permit by an officer who violates the commands of the statute requiring the issuance of a permit. Reliance upon this dictum and the distinction by the Court of *Cantwell* v. *Connecticut*, 310 U. S. 296, at page 306, ignores completely certain important fundamental holdings by this Court in other cases.

(2) The "general rule" of the *Royall* dictum does not extend to cases, like this one, involving civil liberties protected by the First Amendment. The general provisions of the Fourteenth Amendment without the aid of the specific provisions of the First Amendment were alone considered in the *Royall* dictum. A different result occurs when fundamental personal rights covered by the First Amendment are involved. The general rule of convenience of the *Royall* dictum meets up with and must yield the right of way to the

right to defend in civil liberties cases on the ground of unconstitutionality of the law as enforced. Did the Court intend to overrule the holdings of the Court made in *Schneider* v. *New Jersey*, 308 U. S. 147 at pages 161-162; *Thornhill* v. *Alabama*, 310 U. S. 88, at pages 95-96 and *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, at pages 638-639? To me it is plain that the Court rejected these holdings without any justification or without stating any reasons. It ought to say why these cases are being overruled or placed aside!

(3) There is patent inconsistency between the holding in this case and the holdings just cited. Read all of them and consider them together with the holding here. Then you'll see that what I say is true! The heavy blow to freedom of assembly and freedom of worship in this case rebounds. The dynamic First Amendment throws off completely reliance by the Court upon the "general rule" dictum of the *Royall* opinion. The strong provisions of the First Amendment spew out of the belly of the Constitution the poisonous doctrine of convenience and "unfortunate delay" pumped into it by the holding in this case.

(4) It seems obvious that the Court has overlooked completely the constitutional doctrines of (a) preferred position of the liberties guaranteed in the First Amendment, and (b) the weighing of the light municipal and judicial conveniences against the heavy freedoms of the First Amendment found in the cases just cited. If these holdings were in the mind of the Court and have been overruled by the Court, then it ought to order a reargument so that the people can see their fundamental liberties, which were protected in these cases, now openly and expressly disintegrated by the Court. Moreover, the case should be reheard so the Bar can know—and will not have to guess—whether the former decisions above cited are no longer the law.

(5) The Court says that judicial and municipal convenience prevents it from seeing the flagrant abridgment

of the rights of freedom of assembly and religion by the city council. The sandbagging of these freedoms by "unfortunate delay" and prior certiorari proceedings is a new holding. The Court says it can no longer consider the unconstitutionality of a law as enforced by the executive or as construed by the judiciary. The holding of the Court conflicts directly with former holdings of the Court in *Concordia Fire Ins. Co.* v. *Illinois*, 292 U. S. 535, at page 545; *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 20; *Greene* v. *Louisville & Interurban R. Co.*, 244 U. S. 499, 506-508; *Louisville & Nashville R. Co.* v. *Greene*, 244 U. S. 522, 527, 528, 530, 531; *Fidelity & Deposit Co.* v. *Tafoya*, 270 U. S. 426, 434; *Sterling* v. *Constantin*, 287 U. S. 378, 393.

(6) Rehearing should be granted so that the people and the Bar can be told whether these cases above cited are the law. The people and the lawyers ought to know where they stand. When the Court says that unconstitutionality as applied is now different from invalidity on the face of legislation, do we have equal justice under the law? The Court should say expressly which is now the law: (a) the holdings in the cases just cited (that this Court can determine the unconstitutionality of enforcement of a law), or (b) the new ruling of this Court in this case that it cannot. The cases are in irreconcilable conflict. This conflict ought to be cleared up. It can be done only by a reargument of this case.

VI.

This Court's position in civil liberties cases to which it struggled high up the steep slope of adversity for years, was completely lost when it slipped in this case. It has now slid down right to the edge of the precipice. It is about to fall into a bottomless icy crevice through its decision here! But all is not lost. There is yet time for the Court to rescue itself. Within the grasp of the Court (now on the edge) is escape: this petition for rehearing! Grab a hold on the rescue-rope

now by giving heed to the words of Mr. Justice Sutherland, dissenting, in *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103. He said:

> "Do the people of this land—in the providence of God, favored, as they sometimes boast, above all others in the plenitude of their liberties—desire to preserve those so carefully protected by the First Amendment: liberty of religious worship, freedom of speech and of the press, and the right as freemen peaceably to assemble and petition their government for a redress of grievances? If so, let them withstand all beginnings of encroachment. For the saddest epitaph which can be carved in memory of a vanished liberty is that it was lost because its possessors failed to stretch forth a saving hand while yet there was time." —301 U. S., at page 141.

Conclusion

WHEREFORE, while the Court may disagree with everything else said by me, it will agree with me on one thing. That is, that the beautiful shape of the First Amendment must be preserved. From the foregoing argument it seems to me plain that its beauty and symmetry have been marred and deformed by the unfortunate accident that the Court let it suffer in this case. To the end that the injury be corrected and that the symmetry of the law be restored, this petition should be granted. Please order the judgment vacated and a rehearing at a time convenient by granting this petition. After the end of this term (quickly drawing near) there may never be an opportunity for liberty to rise from the grave where it was plunged by this decision, if this petition is not granted.

On rehearing the Court should pass upon the federal constitutionality of the action of the city council properly

raised here. It then should decide, too, whether the decision in the case puts an end to the doctrines of (a) unconstitutionality as construed and applied, and (b) insufficiency of convenience as a balance-weight on the scales of justice against the rights protected by the First Amendment. All these issues were presented to the Court but overlooked by it, as shown above.

Respectfully,

HAYDEN C. COVINGTON
124 Columbia Heights
Brooklyn 1, New York
Counsel for Appellant

May, 1953.

Certificate

I, the undersigned counsel for appellant, do hereby certify that the foregoing petition for rehearing is prepared and filed in good faith. It is made so that justice may be done, and not for the purpose of delay. I also certify that there are grounds for it under Rule 33 of the Rules of this Court.

HAYDEN C. COVINGTON
Counsel for Appellant